Capital Dynasty Sdn Bhd (in liquidation) v Chiang Bing & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D1(D5)–26–97 OF 2008
RAMLY ALI J
19 FEBRUARY 2009

Companies and Corporations — Arrangement, scheme of — Court approval — Liquidators petition for court's sanction — Objections raised challenging petition — Whether there were merits in objections raised — Companies Act 1965 s 176(3) & (4)

The petitioner company, a developer, had undertaken a project to construct multi-level car parks, office towers, a commercial complex and a hotel ('the project'). The project was financed by loan facilities granted by Malaysia Building Society Bhd ('the secured creditor'). However, the project was only partially completed and had eventually been abandoned by the petitioner since the year 2000 leaving some 966 purchasers in the project stranded. On 5 November 2003, the petitioner company was wound up pursuant to a winding up order presented by a creditor of the petitioner under s 218 of the Companies Act 1965 ('the Act'). On 17 June 2005, the High Court appointed liquidators for the petitioner. The liquidators carried out two proof of debt exercises for the end purchasers and the creditors in general to prove their debt and/or beneficial ownership of the units in the project in accordance with the proving of debts provisions in the Act. In addition, the liquidators conducted tender exercises for the purchase and/or rehabilitation of the project. In June 2007, the liquidators received a proposal from Blackstone Eight Sdn Bhd ('Blackstone') for the outright purchase of the land and the project, which proposal was to be carried out by way of a scheme of arrangement ('SOA') to be presented to the purchasers in the project ('the scheme creditors'). Under the proposal, Blackstone was to purchase the land and the project in two parts, namely to purchase the land and the unsold units in the project from the liquidators and secondly to purchase the sold units in the project from the purchasers in the project. However, this proposal was conditional upon the SOA being accepted by the scheme creditors. The liquidators thereafter filed this petition pursuant to s 176(4) of the Act seeking, inter alia, the court's sanction for the SOA between the petitioner and the scheme creditors so as to ensure that the interest of the majority scheme creditors was protected. The liquidators had classified the scheme creditors as either voting purchasers, being those end purchasers and end

financiers who had proved their debts for the purposes of the SOA, and as non-voting purchasers, being those end purchasers and/or end financiers who had not proved their debts for the purposes of the proposed SOA. At the court convened meeting ('CCM') to vote on the SOA the respondents raised two objections challenging the petition for the court's sanction. In their first objection, the respondents submitted that those purchasers in the project who had fully paid up or paid up 90% of the purchase price of their respective units and had been provided vacant possession of their units with the issuance of the certificate of fitness should not be considered as creditors of the petitioner and classified as scheme creditors under the SOA. The second objection was that the secured creditor should not be classified as a scheme creditor and allowed to vote at the CCM.

Held, allowing the petition with costs:

(1) The basis and the classification of the purchasers in the project as scheme creditors were facts made known to the respondents prior to the meeting. In fact a majority of the respondents (all except three) had submitted their respective proof of debts and by so doing had submitted to the liquidators that they were creditors of the petitioner. Therefore it was clear that the challenge to the sanction on this basis was a mere afterthought. The liquidators had classified the respondents as scheme creditors and proposed the SOA because the respondents had agreed to be deemed as creditors of the petitioner. If the respondents objected to being classified scheme creditors, then upon being served with the scheme papers they could have taken the necessary legal action to prevent the CCM from being conducted. However, the respondents had through their conduct acquiesced to the classification and the holding of the CCM. Further, by filing their proof of debt and by attending or alternatively allowing the CCM to be conducted they had waived their rights to raise the first objection (see para 26 (a)–(c)).

(2) In any event the classification of the respondents as scheme creditors was justified. This was because, although some of the respondents had fully paid up for the units purchased, obtained vacant possession and obtained certificates of fitness, the project had been abandoned mid-way and the project site dilapidated. Hence, the petitioner could not justifiably take the stand that it does not owe theses purchasers any further obligations because they had been granted vacant possession. The fact still remained that these purchasers could not have quiet enjoyment of their units in a dilapidated site and as such, it would be unjust to exclude these respondents from the SOA. In any event, the exclusion of such respondents in the same class with other creditors was not prejudicial in any way to the respondents as the amount payable

under the SOA was dependent on the actual amount paid by the respective purchaser to the petitioner prior to the winding up. In the circumstances, there was no merit in the first objection raised (see paras 26 (d)–(f) & 27).

(3) The liquidators had entered into a conditional agreement with the secured creditor to settle part of the petitioner's indebtedness to the secured creditor by vesting all legal and beneficial rights and interest in 531 units in the project because otherwise the secured creditor could take a hard stand on the matter and foreclose on the project based on the charges created in its favour. This would have meant that the SOA would have not been viable. Therefore without the involvement of the secured creditor, there could be no solution to the impasse faced by the respondents and the purchasers in general. Further, this fact had already been expressly stated in an explanatory statement sent to every scheme creditor prior to the CCM. In addition out of the 50 units represented by the respondents there were 32 units represented by 25 respondents that were considered as unredeemed purchasers. These unredeemed purchasers had directly benefited from the SOA by having the secured creditor waive its interest as charges over the unredeemed units (see paras 28–31 & 33).

(4) Another benefit of the inclusion of the secured creditor was the fact that the liquidators were able to set off a substantial part of the indebtedness of the petitioner (see para 32).

(5) The respondents had waived their rights to raise the second objection against the secured creditor as they had themselves failed to attend the meeting and to exercise their voting rights having been given notice of the meeting and filing their proof of debt. In fact, a majority of them did not object when the scheme papers were served on them. As such, by their conduct, they were deemed to have waived their rights to now object to the SOA being sanctioned by the court (see paras 34 & 36).

[Bahasa Malaysia summary

Syarikat pempetisyen, pemaju, telah mengambil suatu projek untuk membina parkir kereta bertingkat, menara pejabat, kompleks komersil dan hotel ('projek tersebut'). Projek ini dibiayai dengan kemudahan pinjaman yang diberikan oleh Malaysia Building Society Bhd ('pemiutang bercagar'). Tetapi, projek ini hanya siap separuh dan kemudiannya dibiarkan terbengkalai oleh pempetisyen dari tahun 2000, 966 pembeli membiarkan projek tersebut begitu sahaja. Pada 5 November 2003, syarikat pempetisyen digulung berikutan dengan perintah penggulungan yang dikemukakan oleh pemiutang pempetisyen di bawah s 218 Akta Syarikat 1967 ('Akta tersebut'). Pada 17 Jun 2005, Mahkamah Tinggi melantik likuidator-likuidator bagi

pempetisyen. Likuidator-likuidator menjalankan dua usaha bukti hutang untuk pembeli-pembeli dan pemiutang-pemiutang amnya untuk membuktikan hutang mereka dan/atau milikan benefisial unit-unit dalam projek tersebut berikutan dengan peruntukan membuktikan hutang dalam Akta. Likuidator-lukuidator juga menjalankan usaha-usaha tender untuk pembelian dan/atau pemulihan projek tersebut. Pada Jun 2007, likuidator-likuidator menerima cadangan daripada Blackstone Eight Sdn Bhd ('Blackstone') untuk membeli tanah dan projek tersebut, cadangan yang mana harus dilaksanakan dengan skim penentuan ('SP') dikemukakan kepada pembeli-pembeli dalam projek tersebut ('pemiutang-pemiutang skim'). Dalam cadangan itu, Blackstone akan membeli tanah dan projek tersebut dalam dua bahagian, iaitu untuk membeli tanah dan unit-unit yang belum dijual dalam projek tersebut daripada likuidator-likuidator dan keduanya untuk membeli unit-unit yang telah dijual dalam projek tersebut daripada pembeli-pembeli dalam projek tersebut. Namun, cadangan ini bersyarat SP tersebut hendaklah diterima oleh pemiutang-pemiutang skim. Likuidator-likuidator kemudiannya memfailkan petisyen ini berikutan s 176(4) Akta, memohon, antara lain, sanksi mahkamah untuk SP antara pempetisyen dan pemiutang-pemiutang skim bagi memastikan kepentingan majoriti pemiutang-pemiutang skim dilindungi. Likuidator-likuidator mengklasifikasikan pemiutang-pemiutang skim sebagai pembeli-pembeli boleh undi, iaitu pembeli-pembeli muktamad dan pembiaya-pembiaya muktamad yang telah membuktikan hutang-hutang mereka bagi tujuan SP, dan pembeli-pembeli tak boleh undi, iaitu pembeli-pembeli muktamad dan atau pembiaya-pembiaya muktamad yang tidak dapat membuktikan hutang-hutang mereka bagi maksud SP yang dicadangkan itu. Mahkamah mengadakan mesyuarat untuk mengundi SP tersebut dan responden-responden membangkitkan dua bantahan mencabar petisyen tersebut untuk sanksi mahkamah. Dalam bantahan pertama mereka, responden-responden menyatakan bahawa pembeli-pembeli tersebut yang telah habis membayar atau sudah membayar 90% harga pembelian bagi unit-unit mereka dan telah diberikan milikan kosong unit masing-masing bersama dengan sijil layak menduduki seharusnya tidak dianggap sebagai pemiutang-pemiutang pempetisyen dan diklasifikasikan sebagai pemiutang-pemuitang skim di bawah SP. Bantahan kedua adalah bahawa pemiutang-pemiutang bercagar tidak harus diklasifikasikan sebagai pemiutang skim dan dibenarkan mengundi dalam mesyuarat tersebut.

Diputuskan, membenarkan petisyen dengan kos:

(1) Dasar dan klasifikasi pembeli-pembeli dalam projek tersebut sebagai pemiutang-pemiutang skim adalah fakta-fakta yang diumumkan kepada responden-responden sebelum mesyuarat tersebut. Malah, majoriti responden-responden (semua kecuali tiga) telah menyerahkan

bukti hutang-hutang mereka dan dengan berbuat demikian, telah mengakui kepada likuidator-likuidator bahawa mereka merupakan pemiutang pempetisyen. Maka adalah jelas bahawa bantahan terhadap sanksi tersebut atas dasar ini merupakan suatu tambahan yang difikirkan kemudian. Likuidator-likuidator mengklasifikasikan responden-responden sebagai pemiutang-pemiutang skim dan mencadangkan SP tersebut oleh sebab responden-responden bersetuju dianggap sebagai pemiutang-pemiutang pempetisyen. Jika responden-responden membantah diklasifikasikan sebagai pemiutang-pemiutang skim, maka, apabila diserahkan dengan dokumen-dokumen skim, mereka seharusnya boleh mengambil tindakan undang-undang yang sepatutnya untuk menghalang mesyuarat tersebut daripada bersidang. Tetapi, melalui tindak-tanduk mereka, responden-responden bersetuju dengan klasifikasi tersebut dan juga persidangan mesyuarat itu. Tambahan lagi, dengan memfailkan bukti hutang mereka dan juga dengan menghadiri atau alternatifnya membenarkan mesyuarat tersebut dilaksanakan, mereka telah melepaskan hak mereka untuk membangkitkan bantahan pertama (lihat perenggan 26(a)–(c)).

(2) Dalam apa jua keadaan, klasifikasi responden-responden sebagai pemiutang-pemiutang skim adalah wajar. Ini kerana, walaupun sebahagian responden-responden telah membayar sepenuhnya bagi unit-unit yang dibeli, mendapat milikan kosong dan juga sijil layak menduduki, projek tersebut telah lama ditinggalkan separuh siap dan tapak projek menjadi usang. Maka, pempetisyen tidak boleh menjustifikasikan pendiriannya bahawa ia tidak mempunyai tanggungjawab kepada pembeli-pembeli ini berdasarkan alasan bahawa mereka telah mendapat milikan kosong. Fakta adalah bahawa pembeli-pembeli ini tidak dapat menikmati keharmonian unit-unit mereka di tapak yang telah usang dan oleh itu adalah tidak adil untuk mengecualikan responden-responden tersebut daripada SP. Walau apapun pengecualian responden-responden dalam kelas yang sama dengan pemiutang-pemiutang lain tidak memprejudiskan responden-responden kerana jumlah yang perlu dibayar di bawah SP tersebut adalah bergantung kepada jumlah sebenar yang dibayar kepada setiap pembeli pempetisyen sebelum penggulungan. Dalam keadaan ini, tiada merit dalam bantahan pertama yang dibangkitkan (lihat perenggan 26(d)–(f) & 27).

(3) Likuidator-likuidator menandatangani perjanjian bersyarat dengan pemiutang bercagar untuk menjelaskan sebahagian daripada hutang piutang pempetisyen kepada pemiutang bercagar dengan meletakhak kesemua hak dan kepentingan perundangan dan benefisial 531 unit dalam projek tersebut, kerana, jika tidak, pemiutang bercagar akan bertegas atas hal tersebut dan menghalangtebus projek tersebut

berdasarkan cagaran-cagaran yang telah dibuat atas pemiutang itu. Ini bermakna SP tersebut tidak akan berkesan/berdayamaju. Maka, tanpa penglibatan pemiutang bercagar, tiada penyelesaian terhadap kebuntuan yang dialami responden-responden dan juga pembeli-pembeli secara amnya. Lagi pula, fakta ini telahpun dijelaskan dalam pernyataan penjelasan yang dihantar kepada semua pemiutang skim sebelum mesyuarat tersebut. Tambahan lagi, dalam 50 unit yang diwakili oleh responden-responden, 32 unit diwakili oleh 25 responden yang dianggap sebagai pembeli-pembeli tak tebus. Pembeli-pembeli tak tebus ini mendapat faedah secara langsung daripada SP tatkala pemiutang bercagar melepaskan kepentingan sebagai gadaian ke atas unit-unit tak tebus (lihat perenggan 28–31, & 33).

(4) Satu lagi kelebihan dengan menyertakan pemiutang bercagar ialah likuidator-likuidator boleh menolak bahagian substansial keberhutangan pempetisyen (lihat perenggan 32).

(5) Responden-responden telah melepaskan hak mereka untuk membangkitkan bantahan kedua terhadap pemiutang bercagar kerana mereka sendiri gagal menghadiri mesyuarat tersebut dan melaksanakan hak mengundi mereka setelah menerima notis berkenaan mesyuarat tersebut dan juga memfailkan bukti hutang mereka. Malah majoriti daripada mereka tidak membantah apabila dokumen-dokumen skim tersebut diserahkan kepada mereka. Maka, melalui tindak-tanduk ini, mereka dianggap telah melepaskan hak-hak mereka untuk membantah SP tersebut diberikan sanksi oleh mahkamah (lihat perenggan 34 & 36).]

Notes

For cases on court approval for scheme of agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 38–41.

Legislation referred to

Companies Act 1965 ss 176(1), (3), (4), 218, 292
National Land Code

Shaikh Abdul Saleem (Felix Raj with him) (Shaikh David Raj) for the petitioner.
KH Tan (Tan, Chua & Lawrence) for the respondents.

Ramly Ali J (now JCA):

[1] This is a petition filed by the liquidators for the petitioner for, inter alia, sanction of this court of the scheme of arrangement ('SOA') between the petitioner and the scheme creditors pursuant to s 176(4) of the Companies Act 1965. The SOA was proposed by the liquidators for the petitioner at a court convened creditors meeting that was held on 31 October 2008 at the

A Puteri Pan Pacific Hotel, Johore Bahru ('the meeting'). The scheme creditors voted in favour of the SOA and the requisite statutory majority and numbers and value as provided under s 176(3) of the Act was met.

FACTUAL BACKGROUND

B

[2] The petitioner is a company incorporated on 31 December 1993. On 27 December 2002, Hayat Berkat Sdn Bhd, a creditor of the petitioner presented a petition under s 218 of the Companies Act 1965 and on C 5 November 2003, the Johor Bahru High Court made a winding up order against the petitioner and the official receiver was appointed as the provisional liquidator. On 17 June 2005, the Johor Bahru High Court appointed Mr Lim Tian Huat and Mr Duar Tuan Kiat of Messrs Ernst & Young as the liquidators for the petitioner.

D

[3] Prior to it being wound up, the petitioner was the developer of a piece of freehold commercial land held under title HS(D) 200923 Lot No PTD 63695 in the, Mukim of Tebrau, District of Johor Bahru and State of Johor E measuring approximately 50,105 square meters which is known as Kemayan City. This project currently comprises of a partially completed four (4) storey commercial complex and two (2) levels of completed car parks. The intention of the petitioner was to construct another four (4) levels of car parks, three (3) blocks of office towers and one (1) block of hotel.

F

[4] However, to date the project is only partially completed and has been abandoned by the petitioner since year 2000 leaving an estimated 966 purchasers in the project stranded.

G

[5] The project was financed by way of a term loan facility of RM30,000,000, a bridging loan facility of RM122,000 and additional bridging loan facility of RM20,000 (collectively 'the loan facilities') which was granted by Malaysia Building Society Bhd ('secured creditor'). As a H security for the financing facilities, the petitioner had granted the secured creditor two (2) first party first legal charges under the National Land Code over the said land vide presentation No 9440/95 Jilid 3212 Folio 66 ('first charge') and presentation No 25226/98 Jilid 4275 Folio 2 ('second charge'). The loan facilities remain outstanding.

I

[6] Since appointment, the liquidators have carried out two (2) proof of debt exercises on 1 September 2006 and 4 July 2008 for the end purchasers and the creditors in general to prove their debt and/or beneficial ownership of the units in accordance to the proving of debts provisions in the Act. The

final cut-off date for the purposes of determining the liabilities of the scheme creditors against the petitioner pursuant to proof of debt exercise of the SOA was on 25 July 2008. A

[7] The liquidators conducted two tender exercises for the purchase and/or rehabilitation of the project. There were four offers which were received but were rejected due to the price being too low or the conditions imposed were not acceptable to the liquidators or the secured creditor. B

[8] In June 2007, the liquidators received a proposal from Blackstone Eight Sdn Bhd ('Blackstone') for the outright purchase of the land and the project which will be done via a SOA presented to the scheme creditors which will be made up of in effect, purchasers in the project. C

[9] The rational of advancing vide a SOA pursuant to s 176(1) of the Act is that s 176(1) empowers liquidators for a wound up company to propose such a scheme. The books and records of the petitioner are currently in the Securities Commission ('SC')'s custody to facilitate their investigation into the affairs of the petitioner prior to the winding up. Therefore the liquidators were unable to confirm the purchasers' listing due to the incomplete books and records. Proceeding by way of a court sanctioned SOA would ensure that as far as possible the rights of all the purchasers in the project are taken cared off. Due to the large number of scheme creditors, a SOA would be the most equitable approach to ensure that the interest of the majority of the scheme creditors is protected. D E F

[10] The purchase by Blackstone of the land and the project is to be done in two (2) parts, namely the purchase of the land and the unsold units in the project from the liquidators and secondly, the purchase of the sold units in the project from the purchasers in the project. G

[11] Following this proposal the petitioner entered into a conditional sale and purchase agreement with Blackstone on 6 June 2008 for the purchase of the land and the unsold units and at the same time entered into a conditional settlement agreement with the secured creditor to settle part of the petitioner's debt. H

[12] Blackstone also issued a conditional letter of offer which was accepted by the liquidators for proposed acquisition of the sold units. The sale and purchase agreement, the settlement agreement and the letter of offer are conditional upon the SOA being accepted by the scheme creditors and sanctioned by the court. It was a condition precedent of the sale and purchase I

agreement that the court sanction for the SOA be obtained within nine months from the date of the sale and purchase agreement, ie by 6 March 2009.

[13] The liquidators have formulated and are proposing for a specific class of creditors, namely the scheme creditors which in effect are made up of purchasers of units in the project and categorised in the following manner:

Voting purchasers

(a) the end purchasers with valid executed SPAs who have proved their claims according to the proving of debts provisions in the Act for the purposes of the SOA in relation to the respective units and which have not been assigned to the end financiers;

(b) the end financier to whom the end purchasers have absolutely assigned their rights to their respective units pursuant to the deeds of assignment and who have proved their claims according to the proving of debts provision in the Act for the purposes of the SOA;

(c) the secured creditor, by virtue of the units under the settlement agreement in relation to its respective units;

Non-voting purchasers

(d) the end purchasers and/or end financiers who have not proved their debts for the purposes of the proposed SOA although their respective units have been disclaimed by MBSB as the chargee; and

(e) the end purchasers and/or end financiers who have submitted their proof of debts but have been duly rejected or have not been admitted by the liquidators according to the proving of debts provisions in the Act for the purposes of the SOA although their respective units have been disclaimed by MBSB.

[14] Whilst being able to benefit from the SOA upon receipt of sanction by this court, the scheme creditors in categories (d) and (e) were not allowed to vote during the meeting as they have failed to properly prove their debts. For the purposes of voting at the meeting, each unit purchased by or vested in the scheme creditors constituted one vote.

THE RESPONDENTS

[15] Majority to the respondents above fall into the category of purchasers whose units have not been disclaimed by the secured creditor ('unredeemed

purchasers'). In fact out of the 50 units represented by the respondents above, 25 of the respondents are regarded as unredeemed purchasers of 32 units in the project.

[16] Despite the scheme papers having been served on the respondents (save for two who did not revert to prior notices by the liquidators), only nine of the respondents bothered to turn up either themselves or by proxy for the meeting.

SALIENT TERMS OF THE SOA

[17] The total sum of RM102,670 ('offer sum') has been offered by Blackstone for the purposes of the SOA. Out of this, the sum of RM3,000 ('contingent sum') will be set aside for the purposes of considering the claims of the contingent purchasers ie other purchasers which may be duly admitted by the liquidators in accordance to the provisions of the Act, subsequent to final cut-off date but prior to completion of the SOA.

[18] The offer sum less the contingent sum and any outgoings such as unpaid assessment to the local authorities is to be distributed to the scheme creditors. This would translate to a settlement of approximately RM0.219 for every RM1 of the progress payment of all the scheme creditors. The remaining progress payment owed by the petitioner to the scheme creditors shall be waived and the LAD shall be treated as unsecured creditors claims under the liquidation process of the company in accordance with s 292 of the Act.

[19] Once the SOA is sectioned, Blackstone shall pay into a joint stakeholders' account the offer sum tentatively expected in the second half of 2009. An extension of time shall be granted to Blackstone for the payment into the joint stakeholders' account, if requested up to 12 months thereafter, subject to late payment interest of 8%pa.

[20] Thereafter, upon receipt of the offer sum from the joint stakeholders' account, the liquidators shall distribute to the voting purchasers their respective share. The liquidators shall only distribute to the non-voting purchasers their respective share if the non-voting purchasers have proved their progress payment and have been duly admitted by the liquidators according to the proving of debts provision in the Act.

[21] For the purposes of the SOA, the secured creditor will waive its rights as charge over the unredeemed units comprising such end purchasers who

have proved their progress payment and have been duly admitted by the liquidators according to the proving of debts provisions in the Act but for which the secured creditor has not received the payments.

OUTCOME OF THE COURT CONVENED MEETING

[22] There was a total of seven hundred and ten (710) voting purchasers representing a total value of RM317,867,997.61 present at the meeting. Out of the seven hundred and ten (710) voting purchasers, there were fifteen (15) voting purchasers representing a total value of RM6,386,322.50 who were not eligible to vote in the meeting because they could not provide the documents during registration.

[23] The number of voting purchasers present and voting, inclusive of corporate representatives and those voting through proxies shows that 95% voted for the SOA while 5% against.

[24] The petitioner had engaged the services of Mr Se Kuo Shen, from Messrs BDO Consulting Sdn Bhd to act as an independent scrutineer to facilitate the tabulation of votes for the meeting. Having regard to the results set out above, the SOA between the petitioner and the scheme creditors achieved the statutory approvals at the said meeting.

THE RESPONDENTS' OBJECTIONS TO THE PETITION

[25] The respondents' objection to the SOA can be summarised into two issues, namely:

(a) Their classification as scheme creditors.

The respondents are contending that the fact that some of the interveners have fully paid or have paid up 90% of the purchase price of their respective units and the fact that some of the respondents have been provided vacant possession of their units with the issuance of the certificate of fitness by the local authorities, the respondents cannot be deemed as creditors of the petitioner and as such cannot be considered as scheme creditors under the SOA; and

(b) The respondent are also taking issue on the involvement of the secured creditor being classified together as a scheme creditor and allowed to vote during the CCM.

OBJECTION (A)

[26] The court is of the view that objection (a) is misconceived and without any legal basis for the following reasons:

(a) the respondents were supplied with copies of the scheme papers prior to

the meeting. The explanatory statement to the proposed SOA was part of the scheme papers. The basis and the classification of the purchasers in the project as scheme creditors were known to the respondents prior to the meeting. In fact, the respondents (save for three) submitted their respective proof of debts and as such have submitted to the liquidators that they are creditors of the petitioner;

(b) it is therefore clear that the challenge to the sanction on this basis is a mere afterthought. The respondent have on the one hand agreed to be deemed as creditors of the petitioner which in turn justifies the liquidator to classify them as scheme creditors and propose the SOA. Had the respondents objected to being classified as scheme creditors or made part of the SOA, it was open for them upon being served with the scheme papers to take the necessary legal action to prevent the meeting from being conducted. Instead, the respondents through their conduct had acquiesced to the classification and the holding of the meeting;

(c) the court is also of the view that by filing its proof of debt and by attending or alternatively allowing the meeting to be conducted they have waived their rights to raise this objection. By allowing the respondents to raise this objection at this stage is highly prejudicial to the majority to the scheme creditors who voted in favour of the SOA during the meeting;

(d) in any event, the classification of the respondents as scheme creditors is justified. Despite the fact that some of the respondents have fully paid for the units purchased from the petitioner and obtained vacant possession and even been provided with the certificate of fitness by the local authorities, the court is of the view that they are still to be deemed as creditors of the petitioner as the petitioner cannot be said to have complied with the terms and conditions under the sale and purchase agreements entered with the purchasers. The fact that the project has been abandoned and the project site dilapidated, the petitioner cannot justifiably take the stand that since vacant possession has been granted the petitioner does not owe such purchasers any obligations;

(e) further, each purchaser would have executed a sale and purchase agreement and a deed of mutual covenant. Looking at the state of the project site and taking into account the fact that no purchaser has quiet enjoyment of their units, the purchasers must still be considered to be creditors of the petitioner despite the fact that the payment obligations

under the sale and purchase agreement and deed of mutual covenants having been met by the purchasers; and

(f) it would be unjust in the event the respondents who have been given vacant possession and certificate of fitness be excluded from the SOA. In any event, the exclusion of such respondents in the same class with other creditors (which may have not paid in full) is not prejudicial in any way to the respondents as the amount payable under the SOA is depended on the actual amount paid by the respective purchaser to the petitioner prior to winding up.

[27] Based on the aforesaid the court finds that objection (a) is not a justifiable basis for this court to refuse to sanction the SOA and even if this court finds merit in objection (a), the interests of the other scheme creditors which supported the SOA and met the statutory approval would override the interests of these interveners who form the minority.

OBJECTION (B)

[28] The basis of objection (b) is that the secured creditor, Malaysia Building Society Bhd ('MBSB') was classified as one of the scheme creditors and had exercised its voting rights during the meeting. The respondents also contend that the voting block by the secured creditor was as such as the other purchasers would be voted out.

[29] This fact is not denied and was expressly stated in the explanatory statement which was sent to every scheme creditor. It was not a situation where it was only made known to the scheme creditors in the morning of meeting as alleged. It was clearly stated in the explanatory statement.

[30] In order for the SOA to be viable, the liquidators had entered into a conditional agreement with the secured creditor to settle part of the petitioner's indebtedness to the secured creditor by surrendering and vesting all legal and beneficial rights and interest in 531 units in the project based on the original selling price. Without the involvement of the secured creditor, there can be no solution to the impasse faced by the respondents and the purchasers in general. In fact, the involvement of the secured creditor directly benefits those purchasers whose units have not been disclaimed by the secured creditor ('unredeemed purchasers') which for the purposes of the SOA were recognised by the secured creditor and thus able to reap the fruits of the SOA. Without this, the rights of the unredeemed purchasers are uncertain and if the secured creditor takes a hard stand on the matter, the secured creditor can foreclose on such unredeemed units irregardless of the rights of the unredeemed purchasers concerned.

[31] Out of the 50 units represented by the interveners above, there are 32 units represented by 25 respondents (including the joint named purchasers) are considered as unredeemed purchasers. These interveners have directly benefited from the SOA by having the secured creditor waive its interest as charges over the unredeemed units.

[32] Another benefit of the inclusion of the secured creditor is the fact that the liquidators were able to set off a substantial part of the indebtedness of the petitioner. The liquidators were able to set off RM240,032,996.80 (calculated based on the original sale price prior to winding up for 531 units) out of the indebtedness of the secured creditor at approximately RM266,402,388.50.

[33] Notwithstanding the benefits to the scheme creditors (including the respondents) and the liquidation of the petitioner and the fact that the project will remain abandoned with no real monetary compensation to the purchasers without the involvement by the secure creditor in the SOA, the SOA would have almost be carried through without the voting block held by the secured creditors. Even without the secured creditor the votes by the scheme creditors for the SOA would be 74% while 26% against.

[34] The respondents has waived their rights to raise objection (b) against the secured creditor as they have themselves failed to attend the meeting and to exercise their voting rights having been given notice of the meeting and filing their proof of debt.

[35] In any event, whilst the secured creditor's votes would meet the majority in numbers, the secured creditor's votes would not have met the required statutory approval with regards to having 75% in value. In order for the SOA to be passed, the votes from other scheme creditors were imperative.

[36] Since majority of the respondents did not object when the scheme papers were served on to them, filed their respective proof of debts and did not bother to turn up for the meeting, the court is of the impression that they have no objection to the SOA. In any event, by not exercising their rights to vote by turning up to the meeting must be deemed as a waiver of their rights to now object to the SOA being sanctioned on the above grounds.

A CONCLUSION

[37] On the above consideration, the court finds there is no merit on the respondents' objections to the petition. Therefore the petition is allowed with costs.

B

Petition allowed with costs.

Reported by Kohila Nesan

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